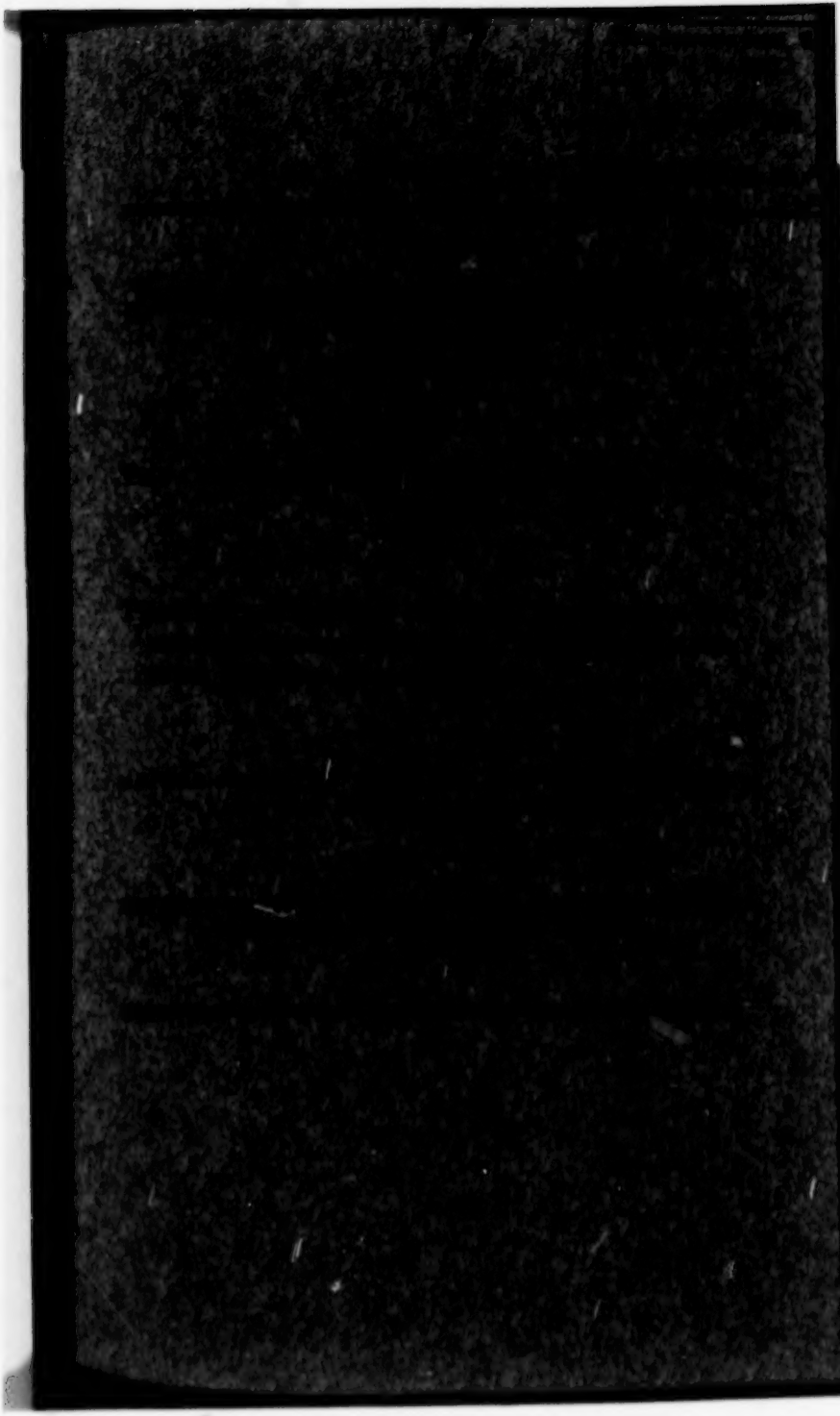

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 97-51

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL., DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, United States of America and Interstate Commerce Commission, pursuant to Rule 12, paragraph (3) of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree entered on October 23, 1951, by a three-judge District Court constituted pursuant to 28 U. S. C. 2284, 2325, dismissing appellant's petition to set aside an order of the Interstate Commerce Commission. Appeal was allowed on November 5, 1951, and the appeal papers were served on November 9, 1951. It is submitted the appeal does not present any substantial question.

The Commission's report and order, dated December 29, 1949, *Gardner, Trustee, Central Railroad Company of New Jersey* v. *Akron, Canton & Youngstown R. Co., et al.*, 276 I. C. C. 655, dismissed the complaint filed by the present appellant, which sought an order directing the 275 defendant railroads to pay to appellant increased divisions of practically all joint rates, both carload and less-than-carload, between the Port of New York district and points throughout the United States, as well as points in Canada and Mexico. The order also vacated an earlier order in the same proceeding, dated October 11, 1948, 272 I. C. C. 529.

Appellant's main line, which extends from Jersey City, N. J., to Scranton, Pa., connects with the lines of other railroads at several points. Numerous through routes between the Port of New York district and interior points throughout the United States are formed by appellant's line and connecting railroads, and joint rates on numerous commodities are in effect over these routes.

The Port of New York district comprises a rate group and consequently, generally speaking, the New York rate applies to all stations and loading points in the district which, broadly speaking, embraces both land and water areas in the New York metropolitan district.

Where marine service is necessary in order to pick up freight at, or to effect delivery to, a pier within the "free lighterage limits" of New York Harbor or to or from a ship docked or anchored in New York Harbor within those limits, the service is performed by the final rail carrier in the route upon eastbound traffic or the initial rail carrier upon westbound traffic. The carriers which reach

and serve points in the Port of New York District are designated as the harbor lines, of which the appellant Jersey Central is one. Other principal harbor lines are the New York Central, Pennsylvania, Baltimore & Ohio, Erie, Delaware, Lackawanna & Western, and Lehigh Valley.

The harbor lines join with each other and with various carriers whose rails do not reach New York in a great number of through routes through many junction points, and maintain over all these through routes joint rates applying to and from the New York district. Over these routes there is uniformity of rate on the same commodity between the interior points and the New York district.

In the division of these joint rates to or from New York harbor points, it has been customary for many years to first allocate a fixed amount, called an allowance, to the carrier performing the marine service in New York harbor, and then to divide the balance between or among all the carriers, including the New York harbor line, on a percentage basis, depending somewhat upon the number of miles of transportation performed by each. Of the thousands of rates and divisions shown of record, one may be selected as illustrating this method of division of rate. The joint rate on angle bars from Steelton, Pa., to New York, N. Y., applicable over the Reading and the Jersey Central, is 13 cents per 100 pounds. This rate includes delivery at any point within the free lighterage limits of New York harbor. The allowance deducted from this rate for payment to the Jersey Central as the harbor line performing the lighterage or car floatage was, at the time of the filing of the complaint, 4.4 cents per

100 pounds.[1] On a shipment weighing 45,000 pounds, on which the total freight charges were $58.50, the 4.4 allowance amounted to $19.80. The division of the remainder of the rate, 50% to the Reading, which transported the shipment from Steelton to Allentown, Pa., 92 miles, and 50% to the Jersey Central, which transported the shipment from Allentown to New York, N. Y., 90 miles, or 4.3 cents to each, amounted to $19.35 to the Reading, and $19.35 to the Jersey Central (the latter being in addition to the Jersey Central's $19.80 under the 4.4 harbor allowance).[2]

In its complaint to the Commission, the Jersey Central put in issue the reasonableness only of the harbor allowance. It did not contend that its total share of the revenue from the joint rates, consisting of its percentage of the joint rates plus the fixed harbor allowance, was unjust or unreasonable, but contended only that that part of its division consisting of the harbor allowance was unjust and unreasonable. It asked the Commission to increase the harbor allowances without making any change in the basis for its division of that part of the joint rate remaining after deduction of the harbor allowance.[3]

In view of the competitive nature of the traffic in question, and in view of the fact that an increase

[1] At the time of the hearings this allowance had been increased to 5.5 cents. These allowances were applicable alike on float or lighter movements. See 276 I. C. C., p. 656.

[2] The data regarding this shipment is shown in Ex. No. 130, lines 42-45.

[3] It is obvious that an increase in the harbor allowance to the Jersey Central would reduce its division of the remaining amount. However, the net effect of the Jersey Central's request, if granted, would have been to greatly increase its total division.

in the Jersey Central's harbor allowance, without a like increase in the harbor allowance of the other harbor lines, would mean that the Jersey Central's connections would receive smaller revenue on traffic routed via the Jersey Central than they would receive on traffic routed over other harbor lines, the Jersey Central also requested the Commission to increase the harbor allowances of the other harbor lines in the same amount as any increase granted to the Jersey Central.

After a full hearing, at which voluminous evidence was received, the Commission issued a report setting forth the facts in great detail, *Gardner* v. *Akron, C. & Y. Ry. Co.*, 272 I. C. C. 529-593. Therein the Commission prescribed certain increased divisions to the Jersey Central in the form of increased allowances for the services of floating and lightering freight in the New York harbor district moving on joint rates of the Jersey Central and its rail connections applicable between the harbor district and defined points in the interior.

Thereafter, upon petition of certain defendant carriers, the Commission reopened the proceeding, and, after reargument, issued a second report, 276 I. C. C. 675, dated December 29, 1949, reversing its prior conclusions and dismissing the complaint. This appeal is taken by New Jersey Central from an adverse judgment of the three-judge District Court in the suit of Jersey Central to set aside the Commission's order of dismissal and the Commission's order of May 18, 1950, which denied the Jersey Central's petition for reconsideration.

The Commission Properly Refused, for Want of Adequate Proof, to Increase the Divisions of the Harbor Lines

In support of its allegations of unlawfulness of the divisions in question, appellant relied largely upon data which it presented as to the costs which it incurred in performing its harbor service. This evidence and defendants' criticisms of it were discussed at some length in the Commission's original report, 272 I. C. C., 548, *et seq.* Appellant also submitted certain data purporting to show its own costs and those of its connections in performing the services under the joint rates other than the harbor services. The first report discussed this data (taken from studies made by five railroads in connection with reorganization proceedings) and found it to be unacceptable, 272 I. C. C., 563-568. This finding was affirmed upon reconsideration, 276 I. C. C., 658.

As previously stated, the Jersey Central requested the Commission to require the other harbor lines to accept the same increases in the harbor allowances as the Jersey Central sought for itself. It contended that, in the case of the other harbor lines, the cost of harbor service was, as in its own case, greater than the amount of the allowance. In its first report the Commission found that the evidence offered to show total harbor costs was incomplete (272 I. C. C., 579) and, on reconsideration, this finding was affirmed (276 I. C. C. 659). The Commission in its second report also found that appellant's evidence concerning the service performed by the carriers participating in the joint rates with the other harbor lines was deficient (276 I. C. C. 659-660).

After making the above rulings and others in its report, the Commission pointed out, p. 661, that before it can find unlawful any divisional arrangements, it must have before it evidence bearing upon the elements laid down for its consideration in Section 15(6) of the Interstate Commerce Act, citing *United States* v. *Abilene & S. Ry. Co.*, 265 U. S. 274, and *Brimstone R. Terminal Co.* v. *United States*, 276 U. S. 104.

In *United States* v. *Abilene & S. Ry. Co.*, at p. 284, the Supreme Court held that in determining just divisions the Commission must consider relative cost of service and also whether a particular carrier is an originating, intermediate, or delivering line; the efficiency with which the several carriers are operated; the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property; the importance to the public of the transportation service of such carriers; and other facts, if any, which would, ordinarily, without regard to mileage haul, entitle one carrier to a greater or less proportion than another of the joint rate.[4]

---

[4] The Court went on to say that it is settled that in determining what the divisions should be, the Commission may, in the public interest, take into consideration the financial needs of a weaker road; and that it may be given a division larger than justice merely as between the parties would suggest "in order to maintain it in effective operation as part of an adequate transportation system," provided the share left to its connections is "adequate to avoid a confiscatory result," citing *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 477; *New England Divisions Case*, 261 U. S. 184, 194, 195. In the present case, the Commission while finding that the over-all revenue needs of the Jersey Central during the years 1934 to 1943 were "somewhat greater than the average over-all revenue needs of the prin-

In the *Brimstone* case, *supra*, the Supreme Court set aside an order of the Commission reducing the division accruing to the Brimstone out of joint rates with connecting railroads, the Southern Pacific and the Kansas City Southern railways, on the ground that the divisions were so disproportionate, in view of the service rendered by the Brimstone, as to be tantamount to a rebate to the shipper which owned the Brimstone. The Court said, pp. 114-115:

> . . . No studies were made or evidence taken concerning efficiency of Southern Pacific and Kansas City Southern lines, amount of revenue required to pay their operating expenses, taxes, and fair return upon their respective property, or the public importance of services performed by them, or any other fact or circumstance (except as shown above) which ordinarily, without regard to the mileage haul, would entitle them to a greater or less proportion of the joint rate. Section 15 (6).
>
> . . . The Commission evidently undertook to deprive the Brimstone Company of receipts supposed to exceed a fair return on its property and award the same to connecting carriers without evidence tending to show they were in need or had or would receive more or less than a fair return from agreed divisions, or that the joint rates themselves were unfair and unjust, or that the agreed divisions

---

cipal official-territory defendants" operating in the described territories, also reached the further conclusion, based on data for 1946 and 1947, that the over-all revenue needs of the Jersey Central "are not now materially greater than the average revenue needs of the principal official territory carriers, operating in the three carrier groups indicated." (272 I. C. C., 577; 568-578.)

> were "unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers."

The Commission's expression of conclusions in its second report herein, p. 661, are consonant with these holdings of the Supreme Court. There the Commission said:

> The just, reasonable, and equitable division or allowance for harbor service to which the complainant or any of the other harbor lines is entitled, as part of the total service performed by all of the carriers under the joint rate, can be determined only by considering the respective divisions of the rate and the services rendered thereunder, with the object of reasonably relating the harbor allowance to the portions of the rate distributed among the respective line-haul carriers. Before we can find unlawful any divisional arrangements, we must have before us evidence bearing upon the elements laid down for our consideration in section 15(6). *United States* v. *Abilene & S. Ry. Co.*, 265 U. S. 274; *Brimstone R. Terminal Co.* v. *United States*, 276 U. S. 104. A revision such as the Jersey Central asks and which the prior report in substance would require, can be made only upon a showing which is sufficiently comprehensive to enable us to determine that the resulting divisions, not only of the Jersey Central, but of the other harbor lines, as well as of the line-haul carriers, will be just, reasonable, and equitable. In the respects pointed out, the record is inadequate for that purpose.

Concerning appellant's contention that the maintenance by the harbor lines of non-compensatory allowances for harbor service constituted a "prac-

tice" in violation of Section 1(6) of the Act, the Commission said in its second report, p. 661, that even if this could be regarded as a "practice", nevertheless under the decision in *Baltimore & O. R. Co.* v. *United States*, 277 U. S. 291, before it could find the "practice" unjust or unreasonable as alleged in the complaint, the same kind of evidence would be required as is necessary in the consideration of an issue under Sections 1(4) and 15(6). It pointed out that in the cited decision the Court had said (at p. 300):

> But even if the matter in controversy were a "practice" within the meaning of the act, the Commission would not be authorized to set it aside without evidence that it is unjust or unreasonable. Paragraph (6) of section 15 empowers the Commission to prescribe divisions of joint rates, but there must be evidence adequate to justify action. * * * That rule may not be avoided by a broad construction of the word "practice."

Following this, the Commission said (at p. 662):

> The decisions in *Pittsburgh & W. V. Ry. Co.* v. *Pittsburgh & L.E. R. Co.*, 61 I.C.C. 272, and in *New England Divisions*, 66 I.C.C. 196, to which complainant refers, are not to the contrary. Indeed, the latter is support for our conclusions here. On page 198 thereof it is stated that "a paramount consideration in determining the equitable share of the joint revenue which any carrier shall receive must be the relative amount and cost of the service which it renders, * * *." As stated, a determination upon that basis cannot be made from this record. On page 200 of that decision, we specifically declined to pass upon the law-

> fulness of the divisions of joint rates on certain commodities which were not of record therein.

The Commission's holdings on this subject are in full consonance with the authorities it cites and seem clearly right; and, in view of the decisions cited, it was clearly unnecessary for the Commission to determine whether a "practice" within the meaning of section 1(6) existed.

The Commission further found that there is a deficiency in the evidence concerning operating efficiency. In this respect the second report states (pp. 660-661):

> Under section 15(6) of the act we are required to give consideration, among other things, to the efficiency with which the carriers concerned are operated. The evidence in this respect is limited to the operating ratios for several years of the Jersey Central as compared with those of 15 of its connections, of the central eastern region, and of the Great Lakes region. There is little evidence relating to the efficiency of the harbor services.
>
> In *State of New Jersey* v. *Baltimore & O. R. Co.*, 245 I.C.C. 581 (May 27, 1941), at page 591, appears this finding of fact with respect to the lighterage service as it was then being performed:
>
> > The average loading of lighters engaged in the so-called free lighterage of waterborne traffic is only about 50 tons, or from one fourth to one-seventh of capacity. This light loading is brought about chiefly by the fact that each railroad serving New York does or arranges for its own lightering, without regard for the greater economy which might be effected through consolidation or joint use of the lighterage facilities

of the various railroads. As a consequence, transfer between car and ship by lighterage is on the average more expensive to defendant trunk lines than direct transfer by at least $1.30 per ton. As long ago as *New York Harbor Case*, 47 I.C.C. 643, 739, decided in 1917, we indicated that the carriers, by their own cooperation and initiative, were expected to bring about improvements in the lighterage service in New York Harbor so as to eliminate wasteful practices therein. Nevertheless, those practices are today substantially the same as they were then, and indeed as they had been for many years prior to that time. Much of the present difference in cost between lighterage and direct transfer could and should be eliminated by the railroads through the joint operation or consolidation of their harbor facilities, a step which cannot much longer be delayed.

So far as this record reveals, no substantial change has been made in the lighterage service since that finding was made. Plainly, it would be inequitable to expect the nonharbor lines, who are not in any way responsible for the harbor service, to bear any part of the cost of furnishing such service which may be entailed by inefficient operation. If there has been any improvement in the economical operation of the harbor service since then, the record should embody evidence to that effect. If no such improvement has occurred, we are entitled to know about it so that a conclusion may be reached upon this element, among others, prescribed for our consideration.

The Commission's Order Clearly Is Not Confiscatory

Appellant contends that since many of the joint rates involved were prescribed by the Commission,

in which appellant is legally required to participate on the existing basis of divisions, the necessary effect of the order of dismissal is to require it to continue indefinitely performing the lighterage and floatage service at a substantial loss and, therefore, the order deprives it of its property without due process of law. This contention is without merit, because it takes into consideration only a part of the services performed by appellant and only a part of the compensation it receives in the division or distribution of the revenue under the joint rates. It is very clear that these joint rates apply only when Jersey Central performs a *line-haul service* in addition to the harbor service and it is equally clear that Jersey Central is in every instance given, in addition to the harbor allowance, a percentage of the remainder of the rate after the deduction of the harbor allowance. This is clearly indicated in the Commission's first report (at p. 531):

> The present allowances are not separate charges published by the harbor lines and paid by the shipper, or absorbed by the connecting carriers. They are sums deducted from the joint rates before prorating the remainder, on the basis of rail percentages, among the participating line-haul carriers, including the harbor carrier which performs line-haul service in addition to the harbor service. Complainant asks that the proposed allowances be similarly deducted from the joint rates, before prorating, but seeks no change in the present rail percentages of the joint rates.

This is illustrated by a single example. The first-class rate from Chicago, Illinois, to New York, New

York, and any point in the New York group is $1.67 per 100 pounds. This rate applies over many different routes, including the Pennsylvania to Buffalo, the Delaware, Lackawanna & Western to Taylor, and the Jersey Central beyond. The total distance is 1,127 miles, of which 674 is performed by the Pennsylvania, 265 by the Lackawanna, and 188 by the Jersey Central. In the division of this rate the Jersey Central is given its terminal allowance of 4.4 cents, and, in addition, its division of the remainder, amounting to 30.7 cents, or a total of 35.1 cents. For its 265-mile haul the Lackawanna received 44.1 cents, and the Pennsylvania, for its origination service in Chicago and for its road haul of 674 miles, 87.8 cents.[5]

As has been pointed out, the Jersey Central made no offer to prove, in the above instance or in any instance, that its total compensation for the total service it performs under the joint rate, consisting of the harbor service and the line-haul service (in the above instance 4.4 plus 30.7, or a total of 35.1 cents per 100 pounds) was less than the cost of performing its total service.

In addition, it seems clear from the history of the harbor allowances, given in Appendix B, pp. 591-593 of the first report, which is based upon and fully supported by the evidence (Tr. 582-590), that the harbor allowances were never intended to cover the cost of performing the harbor service, or to have any relation to such cost. It follows, in view of this history, evidence and findings of the Commission, that it does not establish confiscation to merely show that the cost of the harbor

[5] From Ex. 121, lines 72-76.

service is more than the fixed amount which is added to the division of the carrier performing the harbor service, without also proving that the total compensation for the total service is non-compensatory.

CONCLUSION

Since the Commission order in question, aside from vacating the earlier order, does nothing but dismiss the Jersey Central's complaint and, in conjunction with the report of which it is a part, declines to order increases in the divisions of the harbor lines of the joint rates to and from the New York district, it is obvious that merely to set the order aside would not in itself grant plaintiff the relief it ultimately seeks, viz., an increase in the divisions of the rates in question. It is well settled that the determination of reasonable divisions of joint freight rates, like the determination of the rates themselves, is an administrative function. *Terminal R. R. Assn.* v. *United States*, 266 U. S. 17, 30.

The weight of the evidence, i. e., its reliability and completeness, were, of course, for the Commission. *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 508; *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474. And the courts will not pass upon conflicts in the testimony before the Commission. *Illinois Central R. R.* v. *Interstate Commerce Commission*, 206 U. S. 441, 466; *Interstate Commerce Commission* v. *L. & N. R. Co.*, 237 U. S. 88, 93, 100; *L. & N. R. R.* v. *United States*, 245 U. S. 463, 466.

These rulings apply, we think, to the findings in the Commission's second report of deficiencies

in the record concerning vital matters required by section 15(6) to be considered by the Commission in determining reasonable divisions. All the evidence submitted by the parties was weighed by the Commission and found to be insufficient to support an affirmative order requiring increases in the divisions of the Jersey Central and of the other harbor lines.

The statutory court, in a well-considered opinion (99 Fed. Supp. 564) concluded that the report of the Commission is sound in law, that its factual findings have substantial support on the record considered as a whole, citing *Universal Camera Corp.* v. *Labor Board, supra,* and *Labor Board* v. *Pittsburgh Steamship Co.,* 340 U.S. 498, and that its decision is neither arbitrary nor in disregard of due process. That court discussed at length the legal issues involved and it is unnecessary that they be further enlarged on here. The statutory court's decree should be affirmed without oral argument.

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NOVEMBER 21, 1951.

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Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1951

No. 506

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Appellant,

against

THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

BRIEF ON APPEAL IN OPPOSITION TO MOTIONS OF APPELLEES TO DISMISS OR AFFIRM

Appeal from the United States District Court For the District of New Jersey

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IN THE

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October Term, 1951

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THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Appellant,

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Appellees.

BRIEF ON APPEAL IN OPPOSITION TO MOTIONS OF APPELLEES TO DISMISS OR AFFIRM

Appeal from the United States District Court For the District of New Jersey

---

Preliminary Statement

This is a reply under authority of Rule 7(3) to a motion to dismiss or affirm by the Railroad Appellees, received on November 21, 1951, and a motion to affirm filed by the United States of America and the Interstate Commerce Commission, Appellees, and received on November 26, 1951. The history of the litigation is described in the Jurisdictional Statement.

The decision below is reproduced as Appendix A to the Jurisdictional Statement and is reported as *Central Railroad Company of New Jersey* v. *U. S.*, 99 Fed. Sup. 564.

Questions Presented

Under Rule 7(4) the motions to dismiss or affirm are not sustainable except upon a showing that "the questions on which decision of the cause depends are so unsubstantial as not to need further argument." At this point we have only this comment,—This is not a case, as appellees suggest, to be decided on its special facts, where the doctrine of administrative finality should control. Indeed it seems surprising that the Commission itself has joined in the motion to affirm. It is a case in which a majority of the Commission has placed one construction on certain sections of the Interstate Commerce Act and later another majority has placed a totally different construction on the same sections. Moreover, the issue of confiscation is raised. It follows that very substantial law questions are presented by the appeal,* among the most important of which are the following:

1. Whether, under a proper construction of Sections 1(4), 1(6), 15(1), 15(6) and 15a(2) of the Interstate Commerce Act, the Commission may dismiss a complaint, that a terminal division of joint rates (prescribed by the Commission itself as maximum, reasonable rates), is unjust and unreasonable, on the ground that there is a failure of proof because the rates to be divided are below a maximum, reasonable level?**

---

* See Assignment of Errors.

** Section 1(4) makes it the duty of each common carrier "in case of joint rates and charges to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 1(6) makes it the duty of every common carrier to establish, observe, and enforce just and reasonable practices and declares that "every unjust and unreasonable practice is prohibited and declared to be unlawful."

Sections 15(1) and 15(6) define the Commission's jurisdiction to enforce the above sections.

Section 15(1) requires that if the Commission finds any practice unlawful "it shall make an order that the carrier or carriers guilty shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist."

2. Whether, when it is charged and proved that a terminal division of reasonable joint rates has been deliberately maintained by defendants, at a non-compensatory level, over appellant's protest for a long period of years, the Commission may lawfully dismiss the complaint without deciding whether or not such conduct is an unlawful practice within the meaning of Section 1(6)?

3. Whether, notwithstanding Sections 1(4), 1(6), 15(6), 15a(2), and the Fifth Amendment to the Constitution, a railroad may be compelled to continue accepting a non-compensatory terminal division of a joint freight rate which the Commission itself prescribed?

4. Whether a Court reviewing an administrative order, particularly where confiscation is charged, may disregard "the body of evidence opposed to the Board's view" and the findings of the Board itself, and, without any findings of fact or conclusions of law within the meaning of Rule 52, Rules of Civil Procedure, affirm the administrative order?

We submit that the above and other questions raised by the appeal are of compelling importance from the standpoint of the public interest, especially at a time when Congress by its recent enactment of the Administrative Procedure Act has indicated the need for a reconsideration of the doctrine of administrative finality. The ultimate question really posed by this appeal is whether acts of Congress as construed by this Court still control, or whether there is in America today such a thing as "administrative finality" respecting both the facts and the law.

ARGUMENT

The Issues Are Judicial, Not Administrative

Movants seek to justify the Commission's order of dismissal and the action of the lower court in approving it by alleging lack of proof necessary under Section 15(6). In so doing movants and the lower court wholly overlook the legal issues raised under Sections 1(4), 1(6), and 15(1).

The complaint charged that the defendants were violating Section 1(4) and Section 1(6) of the Interstate Commerce Act by deliberately maintaining, over a long period of years, harbor divisions of joint rates, prescribed as maximum reasonable rates by the Commission itself, and that said divisions were below the cost of the harbor service. It was settled by a stipulation and order, following a pretrial conference, that the primary issue thus raised was the lawfulness of the harbor division.

The evidence conclusively showed that the harbor divisions received, under protest, by the appellant for many years amounted to only about one-half of the cost of the harbor service. The other harbor defendants admitted that ever since 1915 their harbor costs had exceeded the harbor division. The Commission in its first report found that—

> "The evidence as to costs of lighterage for the principal defendant harbor lines, although incomplete and not so up-to-date as that for the Jersey Central, indicates that the allowance received by these defendants for that service is less than the cost of the service."

and that—

> "There is ample reason, therefore, to conclude that the average costs of the float and lighterage services

of those defendants are substantially the same as the average costs of the lighterage services for the Jersey Central." (272 I. C. C. at 579)

These findings of fact were not re-examined or modified or withdrawn.

It is, therefore, submitted that appellant discharged the prima facia burden of proof necessary to show that the harbor divisions were unjust, unreasonable, inequitable, and prejudicial in violation of Sections 1(4) and 1(6) and of "the national transportation policy." (Note preceding Section 1 of the Act.) The defendants offered no cost evidence whatever.

As to these clear violations of the statute, the Commission had certain duties under Section 15(1) and Section 15(6). Its jurisdiction was not purely discretionary but quasi judicial. *Chicago Junction Case*, 264 U. S. 258.

In its first report the Commission recognized the above circumstances and made a carefully considered report finding that the existing harbor division was unjust, unreasonable and inequitable in violation of Section 1(4). This finding, at the very least, required that the Commission enter the cease and desist order which was prayed for in paragraph XII of the Complaint. The Commission further found that while appellant had failed to sustain its contention that it was entitled to a harbor division equal to the full cost of the harbor service, yet, in view of the evidence and the public interest involved, the Commission found that the harbor division, not only of the appellant but of each of the other harbor roads, should be not less than a specified minimum, which was much less than the full cost of the harbor service but substantially higher than the existing division. In arriving at the prescribed minimum harbor division, the Commission made detailed findings respecting each of the elements specified in Section 15(6) and in view of its authority to take into account "any other fact or circumstance which would ordinarily, without

regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate," it properly gave weight to the fact that the harbor divisions had not been increased in proportion to the authorized rate increases in 1915, 1917, 1918 and 1920, although the Commission in prior decisions* had repeatedly found that they should have been so increased.

In its second report, 276 I. C. C. 655, the Commission brushed aside the above evidence and the elaborate findings and conclusions in its first report, which have never been modified but are incorporated in the order complained of. It did not concern itself with the issues raised under Section 1(4) and Section 1(6) and the voluminous evidence bearing on those issues, or with the construction placed on the statute by this Court, in the *New England Divisions Case*, 261 U. S. 185, and in *B. & O. R. Co.* v. *U. S.*, 298 U. S. 349, or with its own consistent practice since 1920 in administering the divisions statute. Instead it adopted the fallacious contention of the railroad defendants that because the New York rates, when originally evolved over 60 years ago, may not have covered the full cost of the harbor service, therefore the New York rates today are less than maximum, reasonable rates, although it is admitted by the answer of the United States—appellee in this suit, that most of the present rates were prescribed since the Transportation Act of 1920 by the Commission itself as maximum, reasonable rates. Since the last statement may seem incredible we pause to assure the court that we deem it literally accurate.

Starting with the above irrelevant premise respecting rates long obsolete and the fallacious conclusion as to the present rates, the Commission, in its second report focused its attention on the absence of evidence which *defendants*

* See *P. & W. V. R. R. Co.* v. *P. & L. E. R. R. Co.*, 61 I. C. C. 272 (1921); *East Jersey R. & T. Co.* v. *C. R. R. of N. J. et al.*, 63 I. C. C. 80 (1921); *Morgantown & Wheeling Railway Co.* v. *Pennsylvania*, 66 I. C. C. 197 (1921); *Ohio & Kentucky Railway Co.* v. *L. & N. R. Co.*, 77 I. C. C. 636 (1923); *New York Dock Railway* v. *B. & O. R. Co.*, 89 I. C. C. 695, (1924); *New England Divisions Case*, 126 I. C. C. 579 at 633, 649 (1927).

had failed to offer as to their own harbor or road haul costs—this being data peculiarly within their own knowledge and custody, and then announced the final conclusion that the complaint must be dismissed because *appellant* had failed to discharge its alleged burden of proof under Section 15(6). When this extraordinary report was issued, appellant, by a petition for reconsideration, promptly called the Commission's attention to its manifest unsoundness and to its total disregard of the principles of proof and procedure heretofore deemed necessary, by this Court and by the Commission itself, if the intent of the divisions statute is to be carried out. Such reconsideration was denied.

Against the above background, the court below, and appellees in support of their motion to affirm, have treated the issues as purely administrative. The controlling issues however are quasi-judicial. Appellees do not deny—

1. That the effect of the Commission's order of dismissal is to compel appellant to continue indefinitely performing the harbor service at a harbor division below cost, under rates prescribed by the Commission itself as maximum, reasonable rates;

2. That, although the Commission itself had prescribed the rates as maximum reasonable rates and although this Court in the *B. & O.* case, *supra*, decided that in proceedings under Section 15(6) the Commission was not "authorized" to treat the rates as in issue, but should proceed on the presumption that the rates were reasonable and fix a fair division regardless of the rate level, yet the Commission measured the burden of proof and premised its order of dismissal on an "assumption" that the rates were less than maximum, reasonable rates; or

3. That, although appellant in its complaint charged, and defendants conceded, that the defendants for years had deliberately maintained the harbor division received by each of the harbor carriers at a non-compensatory level, yet neither the Commission nor the lower court made any determination whether or not such conduct was an unlawful practice under Section 1(6).

From the above analysis it is submitted that, independently of the question as to what would be a fair division, under Section 15(6), appellant is entitled, at the very least, to relief from what has been shown to be an unjust and confiscatory division under Section 1(4), and an unlawful practice under Section 1(6), and that the Commission's reversal of its first report and order was not justified by any lack of proof by appellant, but was due solely to an arbitrary and unwarranted disregard by the Commission of its long established construction and administration of the divisions statute. It follows that this is not a case where the doctrine of administrative finality has any place. Rather it is a case in which the administrative agency itself, having placed two totally inconsistent constructions on the intent of the statute which it is obligated to administer, should welcome judicial guidance.

Movants are merely playing with words when they say that the Commission's order was based on a lack of proof required by Section 15(6), rather than on the Commission's fallacious and unauthorized assumption as to the rate level. This will be clear if, for the moment, we consider the movants' reasoning. What they in effect say is,—True, most of the rates were prescribed by the Commission under Section 15a(2) as maximum, reasonable rates, but the Commission also found that "for the purpose of this case" the rates were less than maximum, reasonable rates; therefore, even though the harbor division is below cost, the Commission was justified in dismissing the complaint because it

could not determine what would be a minimum reasonable harbor division without having proof that the balance remaining would be reasonable. This seems very much like saying that while 10 equals 10, yet the Commission having assumed "for the purpose of this case" that 10 equals only 9; therefore, the Commission, notwithstanding evidence which it found to be convincing, could not find that, with due regard to the public interest, a specified minimum division should be deducted from the prescribed rates, without requiring proof as to the adequacy of the remainder.

In contrast with such reasoning the Commission as the keystone of its first report properly held, that—

> "If the harbor allowance to that carrier (the C. R. R.) based on a correct use of those data is reasonable, and is deducted from a joint rate that is reasonable, the remainder of the joint rate must be viewed as reasonable. There is no showing, or contention upon this record, that the joint rates, in effect at the time of the hearing herein, were not reasonably compensatory (272 I. C. C., at 584)."

In short, the Commission's first report and order were based on findings of fact under Sections 1(4) and 15(6), which the examiners and a majority of the Commission deemed convincing, and on the axiom that, if 1 is a minimum reasonable terminal division and 10 is a reasonable rate, obviously proof is not necessary to justify the conclusion that 9, the remainder, is reasonable. When the Commission made its first report, based on the evidence and the above quoted axiom, and then rejected the axiom, and forthwith denied a petition for reconsideration, it acted abritrarily and the issue under Section 15(6) ceased to be purely administrative and became quasi judicial.

Presumption, in Divisions Cases, That the Rates To Be Divided Are Reasonable

As far back as 1891 this court held that "railroads could not be assumed to be gratuitously performing the terminal service", *Covington Stockyards* v. *Keith*, 139 U. S. 128. In 1902 this Court, in *I. C. C.* v. *C. B. & Q.*, 186 U. S. 320 at 336, went a step further and held that, in the absence of proof to the contrary, "the presumption was that the through rate included adequate compensation for the services rendered at the point of delivery." The present case was tried before the Commission and decided with a clear understanding by all of the parties that the rates were presumed to be reasonable and were not in issue. The Examiners who heard the evidence, and the Commission in its first report, found that:

> "There is no showing, or contention upon this record, that the joint rates at the time of the hearing herein were not reasonably compensatory." 272 I. C. C. at 584.

When the Commission, out of a clear sky, set aside its first report on the ground that "the rates do not include the full cost of the terminal service" and "therefore, for the purpose of this proceeding, must be assumed to be below a maximum, reasonable level", appellants promptly called the Commission's attention, not only to the presumption of reasonableness that prevailed, as a rule of evidence, even prior to 1920, but also to the construction of Sections 1(4), 15(6) and 15a(2) announced by this court in *B. & O.* v. *U. S.*, 298 U. S. 349, which has ever since been generally regarded as in the nature of a rule of substantive law governing divisions cases arising under the Interstate Commerce Act as amended in 1920.

In view of the reasoning of both the majority and the concurring opinion of Mr. Justice [illegible] that case, it has seemed clear that, in dictum, level of the rates or the amount of revenue [illegible] was immaterial, unless it were charged and [illegible] the rates were confiscatory, and that in dictum [illegible] the Commission was only "authorized" to determine the fair share of the complaining carrier or carriers out of the rates to be divided.

As this court pointed out in *U. S. v. Provident Trust Company*, 291 U. S. 272, while, as rules of evidence, certain so-called irrebuttable presumptions, which evolved under the common law, have lost favor as the field of knowledge and availability of proof have widened, yet, to meet the necessities of administrative law our system of jurisprudence sanctions, where public policy requires, the application of rules of substantive law limiting or excluding evidence deemed irrelevant or immaterial to the decision of particular issues. 5 Wigmore on Evidence Second Ed. Sect. 2492. As stated in the above case:

> "The rule in respect of irrebuttable presumptions rests upon grounds of expediency or policy so compelling in character as to override the generally fundamental requirement of our system of law that questions of fact must be resolved according to the proof" (at p. 281).

Following the above statement the court quoted, with seeming approval, Mr. Wigmore's comment that rules may properly be adopted that restrict or exclude evidence of certain kinds of facts "because its admission would injure some other cause more than it would help the cause of truth, and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth. 1 Wigmore on Evidence, Second Ed. paragraph 11."

The above is the reasoning which we have understood this court followed in its construction of Sections 1(4), 15(6), 15a(2) in both the *New England Divisions Case*, (*supra*) and the *B. & O.* case, (*supra*).

As this Court pointed out in the *New England Divisions Case*, Congress, in 1920, owing to the vital public interest involved, "introduced into the federal legislation a new railroad policy", the objective of which was "to assure adequate transportation service". To this end, there was a need not only for increased revenues, but for their fair distribution.

> "The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. It was, indeed, indispensable" (p. 191).

In that case, this court had before it an order of the Commission directing hundreds of connecting carriers west of the Hudson River to grant to the New England lines a flat increase of 15% in their divisions of joint freight rates. The order was attacked on the ground, *inter alia*, that the complainants had not submitted evidence as to the millions of rates and divisions involved but had offered evidence of only typical divisions. In sustaining the order this court said:

> "To require specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief" (p. 197).

and then concluded:

> "That there is no constitutional obstacle to the adoption of the method pursued is clear. Congress may consistently with the due process clause, create rebuttable presumptions *M. J. & K. C. R. R. Co.* v.

Turnipseed, 219 U. S. 35; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61; and shift the burden of proof, *M. & St. L. R. R. Co.* v. *R. R. & W. Commission*, 193 U. S. 53. It might, therefore, have declared in terms, that if the Commission finds that evidence introduced is typical of traffic and operating conditions, and of the joint rates and divisions, of the carriers of a group, it may be accepted as *prima facie* evidence bearing upon the proper divisions of each joint rate of every carrier in that group. Congress did so provide, in effect, when it imposed upon the Commission the duty of determining the divisions. For only in that way could the task be performed" (199).

In the *B. & O. Case*, although only a relatively few carriers and rates on only one limited class of traffic were involved, this court recognized that, since the rates in question had been prescribed by the Commission itself in accordance with the standard fixed in Section 15a(2), any question as to the rate level, was immaterial because the sole issue to be decided was the fairness of the division of the rates. The court, therefore, in unequivocal language held:

"In proceedings to determine and prescribe divisions, the Commission is governed by Section 1(4), 15(6), 15a(2); it is not required or authorized to investigate or determine whether the joint rates are reasonable or confiscatory. The question whether it complied with the requirements of the Act does not depend upon the level of the rates or the amount of revenue to be divided. The purpose of the provision as just cited is to empower and require the Commission to make divisions that colloquially may be said to be fair" (p. 357).

This language has been understood generally as meaning that, in divisions cases, the rates to be divided are not in issue but are presumed to be reasonable, so that in the court's language:

> "The division of presumably reasonable rates was the only problem before the Commission" (p. 356).

In the present case there are over 250 defendants and millions of rates involved. By stipulation the primary issue is the lawfulness of the terminal division. If there is any doubt as to the application of the rules so clearly announced by this court in the above cases as controlling in the administration of the divisions statute, it is respectfully submitted that that doubt should now be resolved.

The Issue of Confiscation

The issue of confiscation in this case is unusually simple for two reasons.—*First*, because the questions of valuation and fair return, so often bothersome in confiscation cases, can be waived and attention confined to "out-of-pocket cost;" and *Second*, because most of the railroad cases involving a charge of confiscation that have been before this court, as for example the *B. & O. Case, supra*, have been complicated by cost estimates that involved countless allocations of joint expense, first, as between freight and passenger service, then as between all freight cost and the freight cost of the particular part of the railroad involved, then as between the total freight cost on the part of the railroad involved and the cost incurred in handling the particular traffic that moved under the rates in issue. In such cases a major part of the cost estimates had to be arrived at by successive arbitrary allocations. For example, any attempt to estimate the road haul costs of the 250 defendants in this case would consist wholly of such allocated costs and

could be intelligently undertaken only by the 250 individual defendants and, when completed, would represent only an educated guess.

The harbor costs on which appellants charge of confiscation rests are not of that character,—they consist almost wholly of direct costs such as wages, fuel and other materials, rental of piers and taxes incurred directly and exclusively in performing the harbor service covered by the harbor division in controversy. The evidence, and the findings of the Commission's first report, conclusively show that the appellant's actual and direct harbor costs, without allowing any return on investment, have been for years substantially greater than the harbor division received. This matter is not controversial. It is notorious! In fact, the defendants base their case primarily on the contention that the cost of the harbor service is not included in the rate and therefore should not be included in the harbor division. Moreover, the Commission premised its order of dismissal on the assumption that the rates do not cover the cost of the harbor service.

Therefore, we repeat that the confiscation issue here involved is extremely simple because, *First*, it is admitted by the answer of the United States, statutory appellee, that most of the rates to be divided were prescribed by the Commission as maximum, reasonable rates; *Second*, the evidence conclusively shows that the harbor costs, not only of appellant but of all the harbor roads, are substantially greater than the harbor divisions; and *Third*, the appellant has been, since the complaint was filed in 1944, and is now, and will continue to be, compelled to perform the harbor service under the prescribed rates and the divisions currently in effect, unless and until the divisions are changed by agreement of the parties or by order of the Commission. As this court, after referring to Sections 1(4), 15(6) and 15a(2), held in the *B. & O. Case, supra*:

"* * * The purpose of the provisions just cited is to empower and require the commission to make divisions that colloquially may be said to be fair.

"But this does not imply that, without regard to amount, the carriers are bound to accept prescribed divisions. Congress is without power, directly or through the commission, to require them to serve the public at rates that are confiscatory. When made in accordance with the Act, the commission's orders prescribing divisions are the equivalent of Acts of Congress requiring the carriers to serve for the amounts specified. Taken, as they must be, in connection with the duties to the public imposed by law upon the carriers, they command service and for that purpose expropriate the use of carriers' property. If when made the prescribed divisions are or later shall become less than just compensation, the carriers may not be required to serve therefor. And, if after appropriate effort they fail to obtain divisions of non-confiscatory joint rates that do constitute just compensation for their services including the use of their properties, the carriers may by suit in equity have the order prescribing, or requiring to be kept in force, the challenged divisions adjudged void and its enforcement permanently enjoined. Section 15(6) requires the commission on complaint of any participating carrier to determine whether existing divisions are just, reasonable and equitable and, if not, to prescribe others that do comply with the law. Its denial of relief from existing divisions operates to direct service under them. Though negative in form, the order of denial is affirmative in effect" (p. 357-8).

The cost data relied upon by the appellant at the hearings was for the full year 1939. However, at the argument before the Commission on April 21, 1948, it was stipulated by counsel that the annual, quarterly and monthly

reports of each of the parties might be used by the Commission to bring the record down to date. In its first report and order the Commission prescribed basic allowances in relation to the rate level in effect from 1939 to 1947. Since 1939, the Commission has found that transportation costs generally have increased by over 70 per cent and the Commission found in this case that "the increase in cost of harbor service has paralleled the increase in cost of transportation generally."

The conclusive circumstance, in answer to appellee's argument that 1939 costs are "stale", is that, notwithstanding the increase of over 70 per cent in costs since 1939, yet even the appellant's 1939 harbor cost exceeded the present harbor division.

It follows that, as held by this court in *New York* v. *U. S.*, 331 U. S. 284 (1947):

> "This is not a case where, by reason of changed conditions, the record is stale. The changed conditions do not affect the issues here. I. C. C. v. Jersey City, 322 U. S. 503, 515; U. S. v. Pierce Automobile Lines, 325 U. S. 515, 535" (p. 349).

In view of appellant's proof of present loss, even if 1939 costs were still in effect; in view of the great losses appellant has been subjected to since the complaint was filed on July 3, 1944; and in view of the Commission's admission that, as the premise of its order of dismissal, it "assumed" "for the purpose of this case" that the rates it had prescribed, do not cover the full cost of the harbor service, appellant submits that the record requires a finding that the order of dismissal has caused, since July 3, 1944,* is now causing, and will continue to cause irreparable injury and involves a taking of appellant's property without just compensation, in violation of the Fifth Amendment.

* See *Arizona Grocery Co.* v. *United States*, 284 U. S. 370, at p. 390.

Judicial Review

Aside from generally endorsing the conclusions of the court below, practically the only comment of the appellees respecting the District Court's opinion, is contained in the last sentence of the motion to affirm filed by the United States and the Commission, which sentence reads:

> "That court discussed at length the legal issues and it is unnecessary that they be enlarged on here."

As we have already pointed out, the District Court's opinion will be searched in vain for any indication of what conclusion it reached on any of the legal issues presented.

What the lower court "discussed at length" were purely factual matters and its only definite conclusion as to these was that, for the reasons stated by the Commission, its order of dismissal was justified by "Plaintiff's deliberate failure to produce adequate proof." Having followed the Commission's unsound reasoning to reach that result, the court then broadly announced:

> "The report of the Commission is sound in law. Its factual findings have substantial support on the record, considered as a whole, Cf. *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474; *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498; its position is neither arbitrary nor in disregard of due process. Its orders reversing its prior order in this matter and denying reargument will be affirmed. Findings of Fact and Conclusions of Law are filed herein in accordance with the provisions of Rule 52, Federal Rules of Civil Procedure."

Although appellant had submitted to the court a detailed formal request for specific findings of fact and

conclusions of law (Appendix to plaintiff's reply brief in lower court) the Findings and Conclusions appended to the court's opinion (99 Fed. Supp. 564, at 575-6) consist merely of a recital of the docket entries and events in the litigation, and do not deal with any of the issues of either fact or law except "Conclusion of Law" 4, which reads:

> "The findings of the Commission contained in its report of December 29, 1949, are supported by substantial evidence on the record considered as a whole and are clearly sufficient to sustain the order of that date."

We do not suggest that it is incumbent on a reviewing court, in determining questions of "substantiality", to examine every detail in a voluminous record on which an administrative agency based its decision. We submit, however, that when, at the very threshold of a controversy, it clearly appears that the agency itself has announced two conflicting views as to the rules of law governing the burden of proof, it is incumbent on the court to first decide the law questions. Until it has done that it has no criteria for passing on the question of substantiality.

Furthermore, after a reviewing court has decided the legal issues as to what evidence is relevant and material, we submit that, in passing on the question of substantiality, the court should at least disclose whether it has even glanced "at the body of evidence opposed to the Board's view"; whether it has weighed and reached a conclusion as to the manifest conflict between the detailed findings of fact by the Examiners who heard the evidence and the Commission in its first report, on the one hand, and the "fragmentary observations" and assumptions in the Commission's second report; and whether it has reached

an "independent judgment on the facts and the law" on the issue raised under the Fifth Amendment.

St. Joseph Stockyards Co. v. United States, 298 U. S. 38, at 51-3.

While the District Court casually referred to the Administrative Procedure Act, its opinion is a mere blanket endorsement of the latest of two conflicting reports by the Commission. The decision discloses that, instead of deciding the controlling questions of law and then reviewing and weighing the evidence of record that was relevant and material to the real issues involved, the court went off on a tangent, by ignoring the law and evidence that should have controlled its decision, and following the Commission in its unsound reasoning and complete disregard of precedent.

Conclusion

We submit that fundamental questions are raised affecting the administration of what has heretofore been described by this Court as "an indispensible" provision of the Interstate Commerce Act.

We further submit that the motions to dismiss or affirm should be denied and that, unless this Court, in view of the seeming disregard of the clear requirements of the Administrative Procedure Act, Section 1009, deems it appropriate, in disposing of the pending motions, to remand the cause to the District Court with instructions, the issues are so far-reaching that this Court should have the benefit of oral argument and briefs on the merits before deciding them.

Respectfully submitted,

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